



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



Ch  
96

PRESENTED TO THE UNIVERSITY  
BY THE RHODES TRUSTEES

425.13 v 22





THE  
**Northerly and Westerly Boundaries**

OF THE  
PROVINCE OF ONTARIO,

AND THE  
*AWARD RELATING THERETO, AS DISCUSSED AND  
EXPLAINED*

BY THE  
HON. SIR FRANCIS HINCKS, K.C.M.G.,

IN HIS  
PUBLIC LECTURE AT THE EDUCATION DEPARTMENT, TORONTO,  
MAY 6TH, 1881.



Toronto:  
PRINTED BY C. BLACKETT ROBINSON, 5 JORDAN STREET.  
1881.

Dr. from Coll. book exch.



THE

# Northerly and Westerly Boundaries

OF THE

## PROVINCE OF ONTARIO.

---

SIR FRANCIS HINCKS having been introduced to the meeting by the Chairman, the Hon. Sir W. P. Howland, K.C.M.G., C.B., delivered the following lecture :—

SIR WM. HOWLAND, LADIES AND GENTLEMEN,—

Before entering on the subject to which I propose to invite your attention this evening, I must express to you the deep gratification which I felt on being invited, during a recent visit, to address a Toronto audience after the lapse of so many years. Should my life be spared for another twelve months, a period of fifty years will have elapsed since, as a young man, I settled in the old capital of Upper Canada, then popularly known as Little York, but within two years afterwards incorporated as the City of Toronto. Ten years after my first settlement at York, I became a member of the Government of United Canada, and was under the necessity of taking up my residence at the capital, since which time, with the exception of about two years, when the sessions of Parliament were held at Toronto, under the alternate system, I have been a comparative stranger among you, although I have had frequent opportunities of seeing several of my old fellow pioneers, and have had the gratification of being invariably met with a friendly greeting, not only by my old friends, but by those with whom I had had differences of opinion on what may now be properly termed dead issues.

Having several years ago entirely withdrawn from party connection, a political address would be wholly repugnant to my feelings ; but circumstances seem to me to render it desirable that the public should



be better informed on a subject which is generally supposed to be imperfectly understood, while it is due as well to my own character, as to the memory of the late lamented Chief Justice Harrison, that a full explanation should be given of the grounds on which the Arbitrators appointed to determine the true boundaries of the Province of Ontario arrived at their decision. Such an explanation is, I think, likewise due to the Right Honourable Sir Edward Thornton, Her Majesty's Minister at Washington, who was good enough, at the joint request of the Governments of the Dominion and of Ontario, to act as third Arbitrator on the occasion referred to. While it is no part of my duty to defend the action of the Dominion and Provincial Governments in agreeing to leave the disputed boundary of the Province of Ontario to be determined by Arbitrators, I may remark that there are many precedents for such a mode of settling conflicting claims. It is fortunate that there is no danger of this question, complicated though it is at present, leading to the fearful consequences which history, as well as our daily observation, teaches us to be the result of territorial disputes. A very large proportion of the wars which have occurred during past centuries, and which have entailed such immense losses of blood and treasure, must be attributed to quarrels regarding boundaries; and in modern times the expediency of resorting to arbitration as the best mode of settling such disputes, has been very generally admitted.

#### CRITICISMS ON THE AWARD.

In the case of the Ontario boundary arbitration in 1878, the unanimous award made after a most careful and conscientious examination of the voluminous papers submitted to the Arbitrators, together with the cases of the learned counsel on both sides, has been severely criticized, not only by the Select Committee of the House of Commons in 1880, but by the leaders of the Dominion Government in the Senate and House of Commons during the last session. It has been stated as an objection to the competency of the Arbitrators, that two of the three were not members of the legal profession, but I have been unable to find any precedent in analogous cases for confining the choice of arbitrators to lawyers. In one of the most recent cases, when arbitrators were appointed to determine the boundaries between Zululand and the Transvaal in South Africa, there was one lawyer, the Attorney-General of the Cape, joined with a civilian, and an officer holding the rank of Lieutenant-Colonel. I own that I fail to discover the value of special legal attainments in such a case; and, moreover, there were before

the Arbitrators conflicting opinions given by eminent judges and lawyers. The greatest judges are far from being infallible, and are themselves always desirous of the assistance of counsel, whose duty is to submit every point of law, and every fact, in support of their respective clients. Let me, for argument's sake, suppose that in a trial before a judge, a clause in an Act of Parliament had a special bearing on the case in controversy, and that the counsel, whose client would be benefited by that clause, were to fail to bring it to the notice of the Court, and that the judgment afforded proof that this important clause had not engaged the judge's attention, surely it would not be contended that, however eminent the judge might be, his judgment ought to carry as much weight as that of a non-professional arbitrator whose opinion had been formed after a full consideration of circumstances, which had never been brought under the notice of the judge. I shall have to make a practical application of this suppositious case to the disputed boundary of Ontario on the south-west, and as bearing on the judgment of Chief Justice Sewell in the *De Reinhardt* case, which was concurred in by his colleagues. I must, before doing so, notice as briefly as possible some statements, which appear to me to be a sufficient justification of my placing on record the reasons, which induced the Arbitrators to make the award which is now the subject of controversy. During the session of Parliament held in 1880, a Select Committee was appointed by the House of Commons to inquire into, and report upon all matters connected with the boundaries between the Province of Ontario and the unorganized territories of the Dominion. The report, concurred in by nine out of thirteen members of that Committee, declares that "the award does not declare the true boundaries of Ontario," adding, "it seems to your Committee to be inconsistent with any boundary line ever suggested or proposed subsequent to the Treaty of Utrecht." One of the principal witnesses, Mr. William McD. Dawson, a portion of whose evidence is embodied in the report, stated that the Arbitrators had adopted a boundary "which was not a possible one." Sir John Macdonald is reported in *Hansard* to have said:—"We have only to read the written statement of one of those Arbitrators, Sir Francis Hincks, in which he admitted they did not settle the true boundary, to be convinced." Sir Alexander Campbell was reported to have made substantially the same statement in the Senate. It has seemed to me that such allegations as I have cited, render it desirable that the public should be put in possession of the grounds, on which the Arbitrators concurred in an award, which, although adverse to the claims of the

Ontario Government, was promptly accepted by it, and subsequently by the Provincial Legislature.

#### SOUTH-WESTERN BOUNDARY.

I shall first consider the South-Western Boundary. It is evident from the report of the Select Committee, that its framer attached much greater weight to Commissions to Governors as affecting boundaries, than the Arbitrators did. Commissions may be of assistance in interpreting obscure language in an Act of Parliament, but where the meaning of an Act is free from doubt, it cannot be set aside by a Commission. The south-western boundary of Ontario depends on the construction of the Imperial Act of 1774, on the effect of the subsequent treaty with the United States of 1783, and on the proclamation issued under the Act of 1791. It is important to consider the circumstances under which the Act of 1774 was passed. In the year 1763 a treaty was concluded at Paris, between England and France, which contained the following provision: "In order to establish peace on solid and durable foundations, and to remove forever all subject of dispute with regard to the limits of the British and French territories on the continent of America, it is agreed that for the future the confines between the dominions of His Britannic Majesty, and those of His Most Christian Majesty, in that part of the world, shall be fixed irrevocably by a line drawn along the middle of the river Mississippi from its source to the river Iberville, and from thence by a line drawn along the middle of that river and the lakes Maurepas and Pontchartrain to the sea . . . . provided that the navigation of the Mississippi shall be equally free as well to the subjects of Great Britain as to those of France in its whole breadth and length from its source to the sea." The treaty from which I have just quoted was concluded on the 10th February, 1763, and on 7th October, 1763, a proclamation was issued erecting four new Governments, one of which was Quebec, the western boundary of which was fixed at the south end of Lake Nipissing. In the year 1774, in consequence of urgent representations, as to the necessity of establishing a settled government in territories, where no government of any kind existed, a bill was introduced by the Government of the day, the object of which was clearly stated by Lord North in language which I shall quote. "It is well known that settlers are in the habit of going to the interior parts from time to time. Now, however undesirable, it is open to Parliament to consider whether it is fit there should be no government in the country, or, on the contrary, separate and distinct governments,

or whether the scattered posts should be annexed to Canada. The House of Lords have thought proper to annex them to Canada, but when we consider that there must be some government, and that it is the desire of all those who trade from Canada to those countries, that there should be some government, my opinion is that, if gentlemen will weigh the inconveniences of separate governments, they will think the least inconvenient method is to annex those posts, though few in population, great in extent of territory, rather than to leave them without government at all, or make them separate ones. Sir the annexation likewise is the result of the desire of the Canadians, and of those who trade to those settlements, who think they cannot trade with safety as long as they remain separate." Now, it must be borne in mind, that the principal posts in the unorganized territories, when the Act of 1774 was passed, were situated on the river Mississippi, and of course in British territory by the treaty of 1763. The pretension of the advocates of the due north line, which is the boundary claimed by the Dominion, is that Parliament deliberately abandoned the natural boundary of the Mississippi, thereby excluding from the benefit of the Act, the very persons for whom it was specially intended, and that it adopted, without a single conceivable motive, a conventional line running due north from the junction of the Ohio with the Mississippi. It is well known that the bill was introduced in the House of Lords in 1774, and that as sent down by that House to the Commons the description was "all the said territories, islands and countries, heretofore a part of the territory of Canada in North America, extending southward to the banks of the river Ohio, westward to the banks of the Mississippi, and northward to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay, and which said territories, islands and countries are not within the limits of some other British Colony as allowed and confirmed by the Crown." Now it has never been pretended that there was any ambiguity in that description as to the western boundary, but a discussion was raised in the Commons by Mr. Edmund Burke, then agent for the State of New York, who had doubts whether under the description Canada might not encroach on territory on the north-east of that State, which had actually been in dispute, and which by amicable agreement had been made over to New York, reserving the rights of Canadian settlers in the disputed territory. The territory on the Mississippi had never been in dispute during the protracted wars between the British and French regarding boundaries in the Ohio valley.

## INTENTION OF ACT OF 1774.

There is not the slightest reason to suppose that a single member of the House of Commons desired to alter the natural boundary of the Mississippi, on the banks of which were the principal settlements, for the inhabitants of which the act was specially intended to provide a government. Mr. Burke, as appears from a report of his remarks in a book entitled "The Cavendish Debates," insisted very strenuously on defining the boundaries more precisely. I am not unaware that the framer of the report of the Commons Committee has, on the authority of Mr. Justice Johnson of Montreal, pronounced the Cavendish Debates as of no authority, but the Hon. Wm. Macdougall has given most satisfactory reasons for considering them a valuable contribution to the history of the period. There is however a letter in existence, addressed by Mr. Burke to the Legislature of New York, in which he explains with great precision the object of his amendments, and from which it is clear that it never was contemplated to interfere with the Mississippi boundary. The change in the description of the boundary was made while the House was in Committee on the Bill, four members, one of whom was Mr. Burke, having left the House in Committee to arrange the new description. It is said "the difference was whether the tract of country not inhabited should belong to New York or Canada," and most assuredly this difference could not possibly apply to territory on the Mississippi River. I shall now cite the boundaries as finally agreed to by the House, and I request your most particular attention to the first words, which seem to me to deserve much more consideration than has been given to them by the advocates of the due north line, from the confluence of the Ohio and Mississippi Rivers. "That all the territories, islands and countries in North America, belonging to the Crown of Great Britain, bounded on the south by a line from the Bay of Chaleurs, along the high lands which divide the rivers that empty themselves into the River St. Lawrence from those which fall into the sea, to a point in forty-five degrees of northern latitude on the eastern bank of the River Connecticut, keeping the same latitude directly west through the Lake Champlain, until in the same latitude it meets the River St. Lawrence, from thence up the eastern bank of the said river to the Lake Ontario, thence through the Lake Ontario and the river commonly called the Niagara, and thence along by the eastern and south-eastern bank of Lake Erie, following the said bank until the same shall be intersected by the northern boundary granted by the Charter of the Province of Pennsylvania, in case the same shall be so intersected, and from thence along

the said northern and western boundaries of the said Province until the said western boundary strike the Ohio ; but in case the said bank of the said lake shall not be found to be so intersected, then following the said bank until it shall arrive at that point of the said bank which shall be nearest to the north-western angle of the said Province of Pennsylvania, and thence by a right line to the said north-western angle of the said Province, and thence along the western boundary of the said Province until it strike the River Ohio, and along the bank of the said river westward to the banks of the Mississippi, and northward to the Southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay." You will not fail to observe that the intention of the framers of the amendment, as of the original Bill, was to include all the territories belonging to the Crown of Great Britain in the newly constituted Province, which were not already included in the old Provinces. You will notice how precise the definition is until the Ohio is reached, after which there was no territory regarding which there could be a dispute. You will likewise bear in mind that the last clause of the description is precisely the same as in the original bill, viz., "Westward to the banks of the Mississippi and northward to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay," and that in that bill "northward" could not have had the meaning which has been claimed for it, and which is that it must necessarily mean "due north," although the meaning of the word is really "towards the north."

#### THE DE REINHARDT CASE.

Great stress has been laid on a decision given in the year 1818 by the Court of Queen's Bench at Quebec, presided over by Chief Justice Sewell, on the trial of a person named De Reinhardt, for a murder committed at a place called Dalles in the vicinity of the Lake of the Woods. Some judges who gave evidence before the Select Committee on the boundaries in 1880, referred to this judgment as conclusive in favour of the due north line. Judge Johnson said that "Chief Justice Sewell, who tried the case, is looked upon as the greatest luminary of the law we ever had in Lower Canada. It may almost be said that he made our laws." Again, Mr. Justice Armour said :—"There is a judicial decision as to the meaning of the word 'northward' in the Quebec Act. The decision was that 'northward' evidently meant 'due north.' That is the De Reinhardt case. No doubt about it, it is a clear decision, and were I deciding judicially I would be bound to follow that

decision." As Mr. Justice Armour proceeded to state, that if asked his individual opinion as a person looking into the matter, he would determine that "'northward' had reference to the territory and not to a limitary line," I do not think that his evidence is much in favour of the due north line. I shall state the reasons which led me, and I believe my co-Arbitrators to attach no importance whatever to the judgment in the De Reinhardt case. The question of boundary was never fairly brought before the Court in 1818. It is well known that very high authorities, including the eminent counsel by whom De Reinhardt was defended, the Honourable Messrs. Cartier and Macdougall, the Honourable David Mills, who has made a most valuable report on the subject, the Messrs. Dawson, up to a recent period, and the learned counsel who represented Ontario before the Arbitrators, have all held that the language employed in the Order in Council and the Proclamation of 1791, "including all the territory to the westward and southward of the said line to the utmost extent of the country called or known by the name of Canada," must be interpreted as giving to Ontario, then Upper Canada, a much more extensive territory to the west, than what it would be entitled to according to the interpretation placed on the Act of 1774 by those who hold that the Mississippi River was the boundary of the old Province of Quebec, and that the Act of 1791 was intended to divide that Province, but not to extend it. I refer to this difference of opinion here to shew that the view taken by the Arbitrators was never presented to the Court in 1818. Had it been pointed out to the eminent judges who presided on that occasion, that the language of the Act of 1774 made special provision for including in the new Province "all the territories, islands and countries in North America belonging to the Crown of Great Britain," before defining the boundaries, it might have been presumed that the intention of the Act would have been so manifest, that even if the language had been deemed ambiguous, its meaning could scarcely have been misunderstood. To my own mind, there is no ambiguity in the language. The object of the Act was to provide for the government of all the territories not included in the old Provinces, and not south of the Ohio River. When the Mississippi was reached, the word "northward" was quite sufficient, as the western boundary was that established by the Treaty of 1763. How any one could have imagined that Parliament would have been guilty of the absurdity of excluding the settlements on the river from the benefit of an Act chiefly intended for them, and of abandoning a natural boundary like the Mississippi in order to run a line due north, without

any conceivable object, is incomprehensible to me. The point which strikes me as important is that De Reinhardt's counsel rested their case on the Act of 1791 and not on that of 1774, and it will be found on reference both to the arguments of counsel, and to the judgment of the Court, that the most important branch of the decision was that the Act of 1791 only authorized the division of the old Province of Quebec into two separate Provinces, and consequently that the proclamation could not be interpreted to give Upper Canada any territory that had not been included in the old Province of Quebec. Now, the Arbitrators were of opinion that on this point the judgment of the Court delivered at Quebec in 1818 was correct, and consequently that the boundaries of Ontario must be limited to those of the Province of Quebec as defined by the Act of 1774. There have been so many opinions, which I admit to be entitled to great weight, in favour of the boundary which was contended for by the eminent counsel for the prisoner in the De Reinhardt case, that it is highly probable that, as lawyers, they held their construction of the Proclamation of 1791 to be correct; I must, however, point out that it is the duty of a lawyer, when defending a criminal, to spare no effort to procure his acquittal, and, in thinking the De Reinhardt case over in my own mind, it occurred to me that if counsel had contended for the Mississippi boundary as that established by the Act of 1774, and had concurred with the Arbitrators, that after the treaty of peace with the United States in 1783, the most north-western angle of the Lake of the Woods became the south-western boundary, they might not have saved the prisoner whom they were defending. The evidence on the trial as to the precise locality of Dalles was conflicting, but to a very slight extent. Mr. Sax, a witness for the Crown, held that Portage des Rats was the north-west angle, and that its longitude was  $94^{\circ} 6'$  west. Mr. Joseph Bouchette placed Portage des Rats in longitude  $94^{\circ} 10'$  west, and the north-western angle in  $94^{\circ} 25'$ . Now, Dalles is placed in  $94^{\circ} 40'$  west longitude, and would consequently have been outside the boundaries of Upper Canada under the award of the Arbitrators. Again, Mr. Coltman, one of the witnesses, stated that Dalles was on the River Winnipeg, about fifteen to eighteen miles from the most north-western point of the Lake of the Woods, and that it was on a line "running to the north with a little westing." If, then, it be assumed that the north-western angle of the Lake of the Woods is the true south-western boundary of Ontario, then Upper Canada, it would have been fatal to the prisoner's case for his counsel to have contended for the boundary established by the Act of



1774, and they accordingly argued most strenuously that the Proclamation issued in accordance with the Act of 1791, had considerably extended the boundaries of Upper Canada. I confess I have been a good deal surprised at some of the recent opinions given by gentlemen who claim to be experts, as to the meaning of the term "northward." Mr. Lindsay Russell declares in his evidence that this word "admits of no choice in its interpretation." Such was not the opinion of Mr. Sax, the surveyor examined for the Crown on the trial of De Reinhardt in 1818, which, although instructive, is not a little amusing, and deserves to be noticed in detail.

#### MEANING OF NORTHWARD.

Mr. SAX—A line, supposing it ran due north from the junction of the Ohio and Mississippi rivers, would leave the River Winnipeg five degrees out of the Province of Upper Canada—not a northward line but a due north line.

ATTORNEY-GENERAL—Do you mean to say that a northward line is not a north line?

Mr. SAX—It is not always; it may be north by east, or north by west, or north north-west, or many other points of the compass. A due north line is one that goes direct to the north pole without any deviation whatever.

ATTORNEY-GENERAL—And does not a northward line go to the north pole? If you had a northward line to run would you not run it to the north pole?

Mr. SAX—Perhaps I might and perhaps not; I would certainly run it northerly, though I might not run it due north.

ATTORNEY-GENERAL—What is to prevent you taking it due north? If you had a line to run from a given point until it struck a river, and thence to continue along the course of that river northward, would you call that drawing a northern line?

Mr. SAX—Undoubtedly it would be a northern line, but not a due north line.

ATTORNEY-GENERAL—Would it not? Could it be east or west?

Mr. SAX—It might, according to circumstances, be a north-eastward or north-westwardly line, and yet a northern line, that is a line having a northward course or drawing nearer to the north pole as it progressed though not an astronomical north line.

ATTORNEY-GENERAL—Is not a north line a line northward?

Mr. SAX—Certainly, a line running due north is undoubtedly a northward line.

ATTORNEY-GENERAL—And a line true north-westward you would call a north-westward line?

Mr. SAX—Certainly, a line due north-west is a north-westward line, but a line, for instance, that runs towards the north, notwithstanding it may gain in its course more northing than westing or easting, is not therefore necessarily a due north line, but is a northern or north-ward line.

CHIEF JUSTICE SEWELL—I really do not comprehend the distinction; to say that a northward line is not a north line, I confess, appears to me to approach the *reductio ad absurdum*. Suppose that we had a compass here, and from a given point I draw a line north-westward, that is to say terminating at a point north-westward, would not that be a due north-west line?

Mr. SAX—It would if drawn due north-west, but if in drawing it you gained northerly it would from the course of its deviation be a line northward though not a north line.

CHIEF JUSTICE SEWELL—Then its course northward must unquestionably be due north if a line north-westwardly is a north-west line. I want to know whether in point of fact, a fact that any man can tell as well as a surveyor, whether a line from the eastern or western point of the compass, drawn northward, is or is not a north line. Just answer that question, yes or no, and then you may explain that answer in any way you think proper.

Mr. SAX—It certainly must be to a certain extent a north line, but not a due north line.

CHIEF JUSTICE SEWELL—Why not?

Mr. SAX—A line drawn from any point between two cardinal points of the compass, direct to any cardinal point, is a due north or due west line as the case may be; but a line may be so drawn between two points as to be called by surveyors a northward or a southward line as it may chance to gain in the course of running it upon that point of the compass to which it is approaching; as I might draw a line from a point north-westwardly but gaining in a northerly direction in its course, so that at its termination it would be a line northward from having more northing there than at the point from which I started.

I confess that I think that Mr. Sax's opinion is entitled to infinitely more weight than that of Mr. Russell.

#### IMPORTANCE OF A NATURAL BOUNDARY.

I have already stated the reasons which induced the Arbitrators to

arrive at the conclusion that the intention of the Act of 1774, and its language, interpreted according to common sense, was to extend the old Province of Quebec, so as to include all the territories belonging to the Crown of Great Britain in America, not included in the old British Colonies, now the United States, nor in the territories belonging to the Hudson's Bay Company, nor in the Indian territories north-west of the Mississippi. The view taken by the Arbitrators was never presented to the Court in 1818, and the territory between the imaginary due north line, and the Mississippi, having become part of the United States, the absurdity of placing such a construction on the Act of 1774, as would have left an important strip of territory without any government whatever did not strike the learned judges. It must be borne in mind, that although the Commission of a Governor cannot supersede an Act of Parliament, as the framer of the report of the Commons Committee of 1880 seems to imagine, it may fairly be cited as corroborative evidence of the intention of an Act, where any ambiguity of language is found to exist. The first Commission issued under the Act of 1774 to Sir Guy Carleton proves conclusively what was understood at the time to be its meaning. Immediately after the word "northward" the words "along the eastern bank of the said river" were added in the Commission. It really looks as if it had occurred to the framer of the Commission that the hastily prepared amendment to the original Act might create doubt at some future time, and yet Mr. Burke, the framer of the description, thus explained his intention. "My idea was to get the limits of Quebec, which appeared to many as well as to myself intended to straiten the British Colonies, removed from construction to certainty: and that certainty grounded on natural, indisputable, and immovable barriers—rivers and lakes, where I could have them, lines where lines could be drawn, and where reference and description became necessary to have them towards an old British Colony, and not towards this new and was thought favourite establishment." Is it conceivable that the author of the passage I have quoted could have intended to abandon such a natural boundary as the Mississippi, for one without sense or meaning, and the adoption of which would have left without any government, the very settlements, which it was specially intended to include? I need only observe further that I believe that those who maintain that the boundaries were enlarged by the proclamation issued under the Act of 1791, concur with the Arbitrators in the opinion that by the Act of 1774, the Mississippi was the western boundary of the old Province of Quebec.

## EFFECT OF TREATY WITH UNITED STATES ON THE BOUNDARY.

I have now to draw your attention to the effect of the Revolutionary War on the boundary of the old Province of Quebec. When the treaty of peace was concluded at Paris, on 3rd September, 1783, boundaries were established to which I shall briefly refer. It is sufficiently evident that there was a desire to find natural boundaries, if practicable, and accordingly the line of division was carried through Lake Superior to the Long Lake, thence by water communication to the most north-western point of the Lake of the Woods, and from thence on a due west course to the river Mississippi. In a paper dated in 1876, written by Mr. S. J. Dawson, the Chairman of the Commons Committee of 1880, he argued that the diplomatists who framed the treaty of 1783 had in view, not the Mississippi proper, but "the main artery of the vast river system to which the comprehensive name of the Mississippi was applied in those days." He maintained that "the diplomatists, who framed the treaty, knew perfectly well that the northerly waters of the Mississippi were far to the south, and that they must have meant a branch or tributary of the Missouri, called the White Earth River, which would intersect the due west line at a point over 450 miles west of the Lake of the Woods." Mr. Dawson held that "it is impossible to avoid the conclusion that the true intent, meaning, and spirit of the treaty of 1783, was that the western boundary of Canada and the United States, and the eastern limit of Louisiana on the due west line, should be at a point upwards of 450 miles west of the Lake of the Woods." I have referred to Mr. S. J. Dawson's opinion so late as 1876, to establish that he recognized the north-western angle of the Lake of the Woods, as within the Canadian territory, and further that he recognized the Mississippi as the western boundary. Mr. Dawson, when he stated with such confidence, that the diplomatists in 1783, "knew perfectly well" that the northerly waters of the Mississippi proper were far to the south of such a line, must have been unaware that, eleven years after the treaty from which I have quoted, viz., in 1794, another treaty was concluded, which commences as follows:—"Whereas it is uncertain whether the river Mississippi extends so far to the northward as to be intersected by a line to be drawn due west from the Lake of the Woods in the manner mentioned in the treaty of peace between Her Majesty and the United States it is agreed etc. The agreement was that the two nations would make a joint survey of the said river from one degree of latitude below the Falls of St. Anthony to the principal source or sources of the said river, and if the result should be that the river would not be intersected by

such a due west line, then the two parties will proceed to establish a boundary by amicable negotiation. This was subsequently accomplished by the Treaty of 1818 establishing the 49th parallel of north latitude. At that time, thirty-five years after the period when Mr. S. J. Dawson thought that diplomatists "knew perfectly well" all about localities, it was not known whether the Lake of the Woods was north or south of the 49th parallel, and it was accordingly provided that a line should be drawn due north or due south from the north-western angle to the 49th parallel. The Mississippi of the treaty between England and France, of the Act of 1774, and of the treaty with the United States, has its source almost due south of the Lake of the Woods, where the international boundary is fixed. It seemed to the Arbitrators that under all the circumstances of the case, the true south-westerly boundary of Ontario should be held to be at the international boundary, rather than at a point due north of the source of the Mississippi. The latter would have been in nearly the same meridian, I may observe, and would have entailed much useless expense in surveys, besides disputes as to which was really the true source of the Mississippi, which according to Mr. S. J. Dawson, is to be found "in numerous brooks and countless lakelets."

#### NORTH-EASTERN BOUNDARY.

I shall now proceed to state the grounds, on which the Arbitrators arrived at their decision as to the true boundary on the north-east. Up to the time when it became my duty to study the question as an Arbitrator, I had been under the prevailing impression that the height of land was the southern boundary of the Hudson's Bay Territory. It would be impossible, on such an occasion as this, to state all the arguments which have led me to think that the pretensions of the Hudson's Bay Company were without foundation. I may, however, refer to the able papers, which the late Chief Justice Draper prepared, regarding the claims of the Company, and likewise to a memorandum from the Hon. Joseph Cauchon, who was Commissioner of Crown Lands in 1857, and which is printed in the appendix to the report of the Commons Committee as the memorandum of Mr. W. McD. Dawson. I presume that the cause of the action taken at that particular time was the approaching termination of the lease of the Indian territories. The claim of the Hudson's Bay Company, under their original charter, was described in the memorandum prepared by Mr. Dawson under the Commissioner's instructions, to be "to government, jurisdiction and right of soil over the whole country watered by rivers falling into Hudson's Bay." I

have been unable to discover any authority for so extensive a claim. There can be no doubt that the Hudson's Bay Company themselves proposed, after the treaty of Ryswick, that the French should not trade or build any house, factory or fort to the north of the Albany River on the West Main Coast, or north of Rupert's River on the East Main Coast. It is true that under the treaty of Utrecht the French were to restore to Great Britain a number of forts, but it does not appear to me that this restoration was ever completed. It was provided by the treaty that "within a year" Commissaries to be named by both parties were to determine the limits between the British and the French, and it is notorious that such Commissaries never did determine the boundaries, while the French king, many years after the treaty of Utrecht, declared with reference to the pretensions of the Hudson's Bay Company, that he was "firmly resolved to maintain his rights and his possessions against pretensions so excessive and so unjust." The proclamation under the Act of 1791 establishes the north-east boundary at the termination of a line drawn due north from the head of Lake Temiscamingue, until it strikes the boundary line of Hudson's Bay, and it is contended by the very same parties who insist, contrary as I think to common sense, that in the Act of 1774 northward must mean due north, that the meaning of words which seem to me sufficiently clear, must have been to the boundary of the Hudson's Bay Territory, and not to the bay. Now, in the Act of 1774, when the territories were really meant, and not the bay, the language is not susceptible of misconstruction. The words are "the southern boundary of the territory granted to the Merchants Adventurers trading to Hudson's Bay." But, as in the case of the western boundary, the Commissions to various Governors afford a clue to the meaning attached to the language of the proclamation by the Imperial Government. For a considerable time the Commissions were in the precise words of the proclamation "to the boundary of Hudson's Bay," but in 1838 Lord Durham's Commission contained the words "until it strikes the shore of Hudson's Bay." Now I wish it to be clearly understood, as Mr. W. McD. Dawson seems to imagine, that the decision of the Arbitrators was founded on the Commission, that such was not the case. In accordance with the Statute of 1791, an Order in Council was passed authorizing the proclamation, which fixed the north-eastern boundary at the boundary line of Hudson's Bay, and that I hold to be a sufficient description of the shore, although it was satisfactory to the Arbitrators to have the additional evidence afforded by the Commissions. I have already adverted to the Albany River having been proposed by the

Hudson's Bay Company as their southern boundary, and it seemed to the Arbitrators that a natural boundary, following the course of that river left to the representatives of the Hudson's Bay Company quite as much territory as they could justly claim. It would be wholly impossible for me within the limits to which I am necessarily confined, to refer at any length to the numerous documents which led the Arbitrators to reject the pretension of the Dominion Government, that the height of land was the southern boundary of the Hudson's Bay Company's territory. The original charter limited the territorial grant to territories, not in the possession of any other Christian prince, and although the subsequent treaties of Ryswick and Utrecht affected the boundaries between France and England, yet there is no evidence of any new grant having been made to the Hudson's Bay Company. In his very able report on the boundaries, the Hon. David Mills has maintained that the effect of the treaty of Utrecht was not to restore to the Hudson's Bay Company what it had lost by the treaty of Ryswick. There was a warm controversy between the two Governments as to whether the term "cede" or "restore" should be used, and it is far from improbable that the British Minister may have been inspired by the Hudson's Bay Company to contend for the word "restore" while the French Minister was very urgent for the word "cede." It appears from a letter of Mr. Prior that according to the *cartes* sent by both plenipotentiaries "there was no very great difference" between the claim of Great Britain, and what France was willing to concede, and it is quite certain that the French never contemplated surrendering the territory claimed by the Hudson's Bay Company to the height of land. As a matter of fact, the boundaries under the treaty of Utrecht were to have been settled by Commissaries, who never acted in the matter, and, fifty years later, Great Britain acquired the French title. Chief Justice Draper furnished a number of extracts from documents bearing on the question of title on which he observed: "They certainly shew that neither after the treaty of Ryswick, nor that of Utrecht, when they stated the boundaries, they were either willing to submit to, or were desirous of obtaining, nor yet in 1750, when they set forth what they thought themselves entitled to claim under their charter, did they ever think of asserting a right to all the countries the waters of which flow into Hudson's Bay. Their claim to lands lying both northward and westward of the bay is entirely at variance with any such idea."

#### OBJECTIONS TO AWARD ANSWERED.

I could not treat the important subject under your consideration

with entire satisfaction if I failed to notice the numerous criticisms to which the award of the arbitrators has been subjected. I shall dismiss very briefly that class that I believe to be numerically the most formidable, whose opposition to the award is based, not on its merits, but on the extent of territory to which Ontario is entitled under it. The decision of the arbitrators had scarcely been announced in 1878 when an anonymous writer over the signature "Britannicus," published several letters on the subject, in which he contended that the award was "open to grave objections," the first being that "the region is worth millions." He was told in an article, that I contributed to the press, that "the Arbitrators were appointed to decide on boundary lines on principles of law and justice, and ought not to have been influenced by the extent or the value of the territory in dispute."

#### CHIEF JUSTICE HARRISON ON AWARD.

I shall offer no apology for citing a few extracts from letters of the late Chief-Justice Harrison addressed to me in August 1878 on the subject of the criticisms made on the award: "I feel satisfied that you can give an answer to all and sundry who attack the award. I believe there never was an award made in a matter of such importance that is so little open to honest criticism . . . Singular to say, since the award was made I have received from Judge McDonald of Guelph an old lithographed map without name or date, but evidently made long before the Constitutional Act of 1791, which indicates the northern boundary of Upper Canada to be on the precise line where we have placed it. . . . I also received the *Gazette* (Montreal) of 15th August, containing the second letter of "Britannicus." These attacks, with the exception of the last, are puerile, and the last is a perfect absurdity. Assume that all which "Britannicus" says about the territory awarded to Ontario, is true, how does that affect the validity of the award? Our duty was judicial, we had little or nothing to do with questions of policy. By the light of the evidence adduced, and the arguments propounded, we unanimously decided upon certain boundaries, for the north and west of the Province. Whether the land thus given to the Province was full of diamonds, or only of worthless rocks, was no business of ours. The surveyor who finds the boundaries of two lots of land is never influenced by the consideration that one piece is intrinsically more valuable than the other. None of the able counsel who addressed us ventured so far to take leave of his senses as to attempt to take such untenable ground."



## JEALOUSY OF ONTARIO.

"Britannicus" is a representative of the class of whose opinions Mr. Royal, M.P., is one of the latest exponents. He was a member of the Select Committee of 1880, and while Mr. S. J. Dawson is the avowed advocate of the formation into a new Province of a large portion of the Province of Ontario, Mr. Royal contends that Manitoba should obtain ports on Lake Superior and Hudson's Bay. The masses outside of Ontario take no other interest in the subject than to oppose the extension of her territory without the least reference to her legal rights. I may notice in this connection an extraordinary assertion in Mr. W. McD. Dawson's evidence to the effect that Quebec would not have consented to enter confederation had the legal boundaries of Ontario been believed to be, where they were placed by the award of the Arbitrators, or, perhaps I should rather say, where the witness himself stated them to be in his report in 1857. There is a very simple answer to Mr. McD. Dawson, and all who share his opinions. The boundaries of Ontario depend on the construction placed on the Statute of 1774, the Treaty of Peace of 1783, and the Proclamation in conformity with the Statute of 1791. The claim of the Dominion, as well as that of Ontario, is based on the construction of the law. Mr. McD. Dawson's recent pretension, which I need scarcely remind you is at complete variance with the former assertions both of himself and of his brother, is based on the omission to define the western boundaries in the Commissions of the Earl of Durham in 1838, and in subsequent Commissions, which, so far as I have any knowledge, is not deemed to have any legal effect by any of the disputants on the boundary question with the exception of the Messrs. Dawson.

## CLAIMS TO MORE EXTENDED BOUNDARIES.

Having noticed those opponents of the award, who do not pretend to appeal to the law in support of their pretensions, I shall advert very briefly to the views of those who contend that the Proclamation issued under the Statute of 1791 extended the territories of Ontario beyond the boundaries of the Province of Quebec as established by the Statute of 1774. The Act of 1791 declares that a message had been sent to both Houses of Parliament, signifying the royal intention to divide the Province of Quebec, and it then makes provision for the future government of the two Provinces to be created out of the old Province of Quebec. It is true that the Proclamation uses the term Canada instead of Quebec. I have already stated that although a Governor's Commis-

sion cannot be invoked in opposition to an Act of Parliament, it may fairly be referred to when the language is at all ambiguous. It seems to me that the Proclamation of 1791 could not be construed to give an extension of territory not contemplated by the Act, but the first Commission issued under it to Lord Dorchester describes the territory comprised in Upper Canada to be all lying to the westward of the line from Lake Temiscamingue to the boundary of Hudson's Bay, "as were part of our said Province of Quebec." The Arbitrators concurred so far with the judgment of the Lower Canada Court in 1818, as to confine the western boundary to that established by the Act of 1774. I have now to refer to a mild criticism which I notice merely to draw attention to what I consider a very reasonable view of the south-western boundary. Shortly after the publication of the award, a writer in the *Monetary Times*, of Toronto, criticized the decision to adopt the north-western angle of the Lake of the Woods as the south-western boundary, on the ground that the true boundary was a point on the meridian of the source of the Mississippi, due west from the international boundary. The writer took precisely the same view as the Arbitrators—that under the Statute of 1774 the western boundary was the Mississippi River, and it must be obvious that such was the view of the diplomatists who negotiated the treaty of peace between Great Britain and the United States. Moreover, he admitted that the award "cannot be impeached as inequitable," although he gave it as his own opinion that the Arbitrators had "stumbled" on a decision which, "if the work had to be done over again, we fail to see in what respects it could be materially improved." I admit that there is much to be said in favour of the view taken by the writer in the *Monetary Times*, which I believe was likewise the view of the Hon. Wm. Macdougall, who has studied the question very carefully, and who has pronounced himself strongly in favour of the Mississippi having been the western boundary of the Province of Quebec under the Act of 1774. Practically it is a matter of no importance whether the south-westerly boundary is at the international boundary or at a point a few miles farther west that would be intersected by a line on the meridian of the source of the Mississippi.

#### HON. WM. MACDOUGALL'S OPINION.

I have noticed Mr. Macdougall's opinion on the south-westerly boundary, and it may be convenient to advert here to his criticism on the award as to the north-easterly boundary. In his speech on the subject in the House of Commons in 1880, Mr. Macdougall stated that

he had become satisfied that the words "boundary line of Hudson's Bay" had been a clerical error of the Attorney-General, but as he did not state the grounds for that opinion, I am unable to judge whether they are entitled to any weight. It appears however from his evidence before the committee, that when in England in the year 1869 he took a great deal of trouble to ascertain whether the description was a clerical error. He searched the records of the colonial office without success, and then went to the Privy Council office where he procured the Attorney-General's fiat, which, he said, he opened "with a good deal of anxiety," only to find the same language as in the original proclamation, "to the boundary line of Hudson's Bay." He still, however, clings to his opinion that "it was an error of the Attorney-General, who being human in those days, as in these, was liable to err." May it not be possible that Mr. Macdougall himself has erred in his conclusion that an error was committed by others? The Arbitrators, I need scarcely add, did not feel themselves justified in assuming that the proclamation issued in conformity with an Act of Parliament contained an important error. Mr. Macdougall likewise stated that the Arbitrators "had found in some communications between the Imperial Government and their officers in this country the words 'to the boundary line of Hudson's Bay.'" This seems to me an extraordinary mode of describing a proclamation issued on the authority of the King in Council for the division of the Province of Quebec in accordance with an Act of Parliament. Mr. Macdougall took no notice of the commissions in which the shore of Hudson's Bay was declared the boundary, nor does he seem to have recollected that on every occasion when the territorial boundary was meant the description was invariably "The territory belonging to the Merchants Adventurers trading to Hudson's Bay." Mr. Macdougall has acknowledged that the Hudson's Bay Company had at one time agreed to accept the Albany River as the southern boundary of their territory, and although it was never agreed to by the high contracting parties, still the fact that the Hudson's Bay Company at that period made no claim to any country south of the Albany River is confirmatory of the correctness of the award.

MR. W. M'D. DAWSON'S OPINION.

I shall now proceed to the consideration of another view of the boundary question. In the report of the Select Committee of 1880, the evidence of Mr. W. McD. Dawson, is prominently brought forward, as that of the person "who was the first to investigate the case on the part of Canada, in 1857, than whom no one should have a more thorough

knowledge of the subject." Mr. McD. Dawson himself states in his evidence that he wrote a report in 1857 for the Commissioner of Crown Lands, which he adds "has been the cause of all the controversy that has since taken place in relation thereto." He gave an interesting account of the circumstances under which he wrote this well known report, having assured Mr. Cauchon, who was then his chief, "that there was no authority whatever for such a boundary" as the northern watershed of the St. Lawrence.

I may state, before noticing Mr. Dawson's evidence further, that it ought to be carefully read, together with his own report of 1857, and I shall be much surprised if any different opinion from my own is arrived at, and that, I must acknowledge, is that it is a mass of inconsistency. Mr. Dawson informed the Committee that "the case presented by the Dominion was no case at all," that the learned Counsel, "after a great deal of desultory reading, failed to seize the true facts of history bearing on it," and he then referred to the prevailing ignorance of the subject, which he illustrated by a quotation from the evidence of his esteemed friend, Col. Dennis, Deputy Minister of the Interior, which I shall have to notice later.

#### CHARGE AGAINST DOMINION COUNSEL.

Mr. Dawson has not only made the very serious charge against the learned counsel for the Dominion which I have just cited, but in his answer to a question whether he had, himself been consulted, he declared that "it very often seems to be the habit of governments not to consult those who know most about the case that has to be dealt with." I should feel that an apology was due from me to the learned counsel for the Dominion, Mr. McMahon, Q.C., of Ontario, and Mr. Monk, of Montreal, for noticing such a charge, were it not that it enables me to define clearly Mr. W. McD. Dawson's peculiar position as to this question. It will not I presume be denied by a single member of the legal profession, or indeed by anyone else, that the duty of the learned counsel for the Dominion was to advocate the claim of the Government which they represented, to the utmost extent of their ability. The Dominion claim which was formally made in March, 1872, was to a boundary on the west on the meridian due north from the confluence of the Ohio and Mississippi rivers, and on the north, to the height of land dividing the waters which flow into Hudson's Bay, from those emptying into the great lakes. Such was the Dominion claim made in 1872, in the form of a draft of instructions for a Commission to be appointed to survey and locate the boundaries. If the Dominion counsel had neglected to

support the pretension, which they were retained to defend, they would of course be liable to censure, but it has never been pretended by any one, until very recently by Sir John A. Macdonald, that they failed from want of zeal. I am sure that the Arbitrators would have unanimously borne testimony to their exertions in support of the boundaries, which they were instructed to contend for. But then they did not consult Mr. W. McD. Dawson. Now it is quite true that there is a very wide divergence between Mr. Dawson's opinions in 1857 and in 1880. Most assuredly no lawyer who had read Mr. Dawson's report of 1857, would have called on him to support the Dominion claim, and if the learned Counsel could have made a forecast of Mr. McD. Dawson's evidence in 1880, he was the last person to whom they would have applied for aid in support of their case. An extract or two from Mr. McD. Dawson's evidence will suffice. He said "I think therefore that in commencing their description at the shore of Hudson's Bay, the Arbitrators were correct." Then having referred to Lord Durham's Commission in 1838, which only defined the boundary into Lake Superior, Mr. Dawson states in his evidence, "From that date the Province of Upper Canada no longer subsisted as a divisional part of the old Province of Quebec." The Messrs. Dawson avow that they hold the opinion that the language in the Commission of a Governor can supersede an Act of Parliament, although in the report it is said, "it may be remarked that the judges who appeared before your Committee seemed to be strongly of the opinion, that the boundaries of provinces with constituted governments could not be altered by Commissions to Governors or proclamations." I refer to Mr. Dawson's opinion at present, merely to demonstrate the impossibility of counsel employed to advocate the Dominion claim, being guided by his advice, valuable as he himself pronounced it to be. Let me suggest a case. Had the Government of Mr. Mackenzie, in 1878, instructed the learned counsel, which it employed, to abandon altogether the pretension of Sir John Macdonald in 1872, and to adopt the Dawson theory, if I may so term it, that the true western boundary was to be determined by the Commission to Lord Durham in 1838, as terminating at the east end of Lake Superior, and had the decision been precisely what it was, as it most assuredly would have been, what, I ask, would have been the consequence? Why, from one end of the Dominion to the other it would have been proclaimed that the Government of Mr. Mackenzie had deliberately sacrificed the rights of the Dominion to the Province of Ontario. Between those who contend for the due north line, and for the Mississippi boundary, there is at least one

principle held in common. Both profess to be governed by the Statute of 1774, and to claim the boundary prescribed by that Act. They differ as to the interpretation of the Act, but they acknowledge it as their guide. The Messrs. Dawson repudiate it altogether, and claim that the Province of Canada had been deprived, by virtue of the language of a Commission, of territory over which it had exercised jurisdiction during many years. I feel assured that on one point there can be no difference of opinion, and that is, that Mr. Mackenzie's Government acted wisely in instructing their Counsel to maintain the Dominion Claim precisely as it had been put forward by the Government of Sir John Macdonald. Even if Mr. Dawson's view of the question were as sound, as I believe it to be the reverse, it would have been most improper for counsel to have entertained it. Their duty was to defend the Dominion claim, not that of the Messrs. Dawson ; and they performed it faithfully.

#### MR. WM. M'D. DAWSON'S INCONSISTENCY.

In his report in 1857, Mr. Dawson had taken the most extreme view of the claim of Ontario, then part of United Canada, and he felt it necessary to endeavour to reconcile that opinion with the one which he subsequently adopted in 1880. He declares in his last evidence: "I claimed these countries as the birthright of the people of United Canada," but he soon after admitted that "the claim put forward by me would have inured, if promptly and efficiently maintained, to the benefit of Upper Canada, but that was not a point of special importance at the time we were one Province, under one government and one legislature, and every acre of those vast regions was as much the property of the one as the other portion of the United Provinces." This is a specimen of Mr. McD. Dawson's mode of reasoning. The claim was either in accordance with the Act of 1774, or it was without foundation. In 1791, Mr. Dawson must admit, that all the territory in the old Province of Quebec, which was not comprised in Lower Canada, became part of Upper Canada. The disputed territory, as I will call it for the sake of convenience, was, of course, part of the United Province, and when the Provinces were again separated Ontario retained the precise boundaries of Upper Canada. To do the Dominion Government justice, they have never pretended that Ontario was not entitled to her true boundaries, but have merely disputed what those boundaries really were. Mr. Dawson asserts that the decision of the Arbitrators "has no basis whatever of history or fact to sustain it," and he then gives it as his opinion that they had "one of three things open to them to declare," viz. : 1st. That

Ontario embraced the whole North-West Territory under the Proclamation of 1791, which I have just dismissed as untenable." The Arbitrators dismissed it likewise, although Mr. McD. Dawson's report of 1857 was calculated to induce them to adopt that boundary. 2nd. "That it was bounded by the line prescribed by the Quebec Act in 1774." That was precisely what the Arbitrators did decide, although the precise boundary was necessarily governed by the terms of the treaties between Great Britain and the United States, negotiated during the interval. 3rd. "That a more recent definition, which they seemed to have intended to adopt in part, should prevail. Mr. Dawson is completely mistaken if he imagines that the north-eastern boundary was adopted on the ground of the language in the Commissions of Lord Durham and of other Governors. The Proclamation issued under the authority of the Statute of 1791 and of an Order in Council, was the ground of the decision, although the Commissions were held to be corroborative of language not quite so clear as might have been wished. It appears, then, that although Mr. W. McD. Dawson stated in his evidence that the decision of the Arbitrators "had no basis whatever of history or fact to sustain it," the south-western boundary was determined on one of the three grounds which he himself stated in his evidence it was "open to them to declare," viz., "that it was bounded by the line prescribed by the Quebec Act in 1774," while, as regards the north-eastern boundary, his own language in his evidence is:—"I think, therefore, that in commencing their description at the shores of Hudson's Bay the Arbitrators were correct." I think that it will be generally admitted that the evidence of Mr. W. McD. Dawson has no weight whatever, and I shall therefore proceed to consider the course which the Dominion Government has adopted with reference to this boundary dispute.

#### POLICY OF DOMINION GOVERNMENT.

It will, I presume, be at once admitted that the Province of Ontario is entitled to precisely the same territory west of the Quebec boundary line to which united Canada was entitled prior to Confederation. I have already referred to Mr. Cauchon's report of 1857, which Mr McD. Dawson claims as his own, and which is published as his in the appendix to the report of the Select Committee of 1880. That report, which was adopted by the Government of the day, concludes a long historical statement in the following words:—"This brief chronological sketch of the history of the Company and of the circumstances connected therewith, must sufficiently shew that they have acquired no territorial grant what-

ever under either of the two conditions to which their Charter was subject; first, as regards the countries then known upon 'the coasts and confines' of Hudson's Bay, because they were already in possession of another Christian prince, and were therefore excluded from the grant in terms of the Charter itself; and, second, as regards discoveries, because when they first penetrated into the interior, 104 years after the date of their Charter, they found the country and, a long established trade, in the hands of others, unless, indeed, as regards some discoveries to the north, which are of no special importance to Canada." In his evidence before a committee in 1857, Mr. McD. Dawson stated that for "the boundary designated for us by the Hudson's Bay Company, viz., the watershed of the St. Lawrence, there is no earthly authority except themselves." Mr. Dawson's view, which gave Canada, now represented by Ontario, much more territory than was given to it by the Arbitrators, was deliberately adopted by the Government of the day. On the 16th January, 1869, a letter was addressed to the Colonial Department by the late Sir George E. Cartier and the Hon. William Macdougall, from which I shall make a brief quotation:—"Whatever doubt may exist as to the 'utmost extent' of old or French Canada, no impartial investigator of the evidence in the case can doubt that it extended to and included the country between the Lake of the Woods and Red River." The chief opposition to the award of the Arbitrators has been raised by the professed admirers of Sir George Cartier, who declared that "no impartial investigator" would hesitate as to giving Ontario a greater extent of territory than that awarded by the Arbitrators. It is evident from another part of the letter that Sir George Cartier and Mr. Macdougall held the same views as the counsel for the prisoner in the De Reinhardt case, as the counsel for the Ontario Government, as the Hon. Mr. Mills, and as both the Messrs. Dawson so late as 1876. I shall now advert to the negotiations in 1872 between the Governments of the Dominion and of Ontario. On the 14th March of that year the Hon. Joseph Howe, the Secretary of State, transmitted to Lieut.-Governor Howland, a draft of instructions to be given to the Commissioner who was to be appointed to locate the boundary line. The instructions prescribed as the westerly boundary the meridian of the confluence of the Ohio and Mississippi rivers, known as the due north line, and as the northerly boundary the height of land. This was objected to by Ontario, and the boundary has remained ever since in dispute, although in a report made by Sir John Macdonald on the 1st May, 1872, the importance of establishing it without delay was forcibly urged. It is to



be inferred from the evidence of Col. Dennis, Deputy Minister of the Interior, that the Dominion claim made early in 1872, and which was at complete variance with the previous pretensions of that Government, was based on a report from himself to the Minister of Justice, Sir John A. Macdonald, dated 1st October, 1871. In that report it is expressly stated, in section 18, that the Charter of the Hudson's Bay Company described their grant "as extending over and including all lands and territories drained by the waters emptying into Hudson's Bay," and reference is made to a copy of the Charter marked F. On this Mr. W. McD. Dawson remarks:—"Whereas there are no such words in it, nor anything that, as I would translate that very absurd document, could possibly bear such a construction." Mr. McD. Dawson did not, when pointing out the mistake into which Col. Dennis had fallen, advert to the fact that this misquotation from a document which, it may be presumed, Sir John Macdonald accepted without ascertaining its correctness, was made the ground of a territorial claim which, although nearly ten years have elapsed, is still in dispute.

#### AWARD SHOULD BE ADOPTED OR SET ASIDE ON APPEAL.

The question at issue between Ontario and the other Provinces comprised in the Dominion is so important that I feel that it would be unbecoming in me to make any complaint of the treatment of the Arbitrators who faithfully discharged a public duty which they were called upon to perform. Their unanimous award, arrived at after a careful study by each Arbitrator of the evidence in the case and without previous consultation or communication of any kind with one another, has been attacked in a manner wholly without precedent to the best of my belief. I am persuaded that no Government in Great Britain would repudiate an agreement entered into by its predecessors to leave a disputed question to arbitration. This, however, is a point which I have no intention of discussing. I merely wish to state that my own anxious desire would be that there should be an appeal to set aside the award to the highest judicial tribunal. In the mean time I desire to record my entire dissent from the statement of Mr. S. J. Dawson, as reported in *Hansard*, that "the award was made in the absence of anything like full information on the subject, and even without a due consideration of the information that was available," and having by your indulgence been permitted to explain the grounds on which the award was made, I rely with implicit confidence on the judgment of an enlightened public as to its merits.

## SUMMARY OF CHARGES—DEFENCE OF COUNSEL.

I shall be as brief as possible in summing up. I think the charges may be stated as, 1st, "The whole case was thrown away—it looks almost as if it was deliberately thrown away." "It was most wretchedly managed on the part of the Dominion." 2nd, "They, the Arbitrators, did not affect to set up the true boundaries according to law; they laid down a mere conventional or convenient boundary." I have given the utterances of Sir John Macdonald in the House of Commons on the 18th March last as I find them in *Hansard*. In support of the first charge, Sir John Macdonald referred to the Imperial Act authorizing the surrender of Rupert's Land and the North-West to Canada, and stated that "the contention was not raised that that Act says that Rupert's Land shall be held to be whatever was in possession or deemed to be in possession of the Hudson's Bay Company," and again "to shew how ineffectually the Dominion case was presented, I may say that that view of the subject was never presented before the Arbitrators." I fear very much that owing doubtless to his more pressing duties, Sir John has been unable to read the papers in the boundary case, and that he has relied on others, as in the case already noticed of Col. Dennis's misquotation in 1871, to supply him with facts. Had he read the parliamentary blue book he would have found at page 254 in the Dominion case submitted by Mr. McMahon, Q.C., the statement that the 2nd section of the Act, 31 and 32 Vic., cap. 105, provides that Rupert's Land "should include the whole of the lands and territories *held or claimed to be held* by the said Governor and Company." The words underlined were placed in italics, but possibly by the framer of the report or some other official. Mr. McMahon, however, in his address to the Arbitrators, as will be seen at the foot of page 283 and 284, specially brought the clause under consideration as being "a confirmation of everything that the Hudson's Bay Co. had been claiming under their Charter" adding "that is a point which I am sure the Arbitrators will not lose sight of in dealing with the question." And yet Sir John Macdonald stated in the broadest and most explicit terms that Mr. McMahon never presented this view to the Arbitrators, and consequently deliberately threw away the case. A word now as to the Arbitrators. I can only answer for myself. My interpretation of the Rupert's Land Act is that it was intended to convey to the Dominion the whole property of the Hudson's Bay Company, with certain specified reservations that have no bearing on the point under consideration. I did not imagine that the Act could be so interpreted as to transfer territory belonging to a third party, and I am perfectly

certain that if Sir John Macdonald's construction of the statute could be maintained, it would be in direct contradiction to the spirit and intention of the Act, and a gross act of injustice. I proceed to the second charge. The duty of the Arbitrators was to find the true boundaries of Ontario, and they are charged with declaring "a mere conventional or convenient boundary." Now, for my present purpose, I shall refer merely to those pretensions which specially engaged the consideration of the Arbitrators as affecting the south-western boundary. On the claim under the Proclamation of 1791, which the Arbitrators held to be valid, notwithstanding the able arguments of counsel, of the Hon. Mr. Mills and others, including the Messrs. Dawson, one of whom, the Chairman of the Committee of 1880, fixed the boundary at the White Earth River, 450 miles west of the Lake of the Woods, they concurred in the judgment of the Quebec Court in 1818 that no territory could be awarded to Ontario that was not comprised in the old Province of Quebec as created by the Act of 1774, modified by the Treaty of 1783 with the United States and by subsequent treaties. They entirely rejected the Dominion claim to a boundary on what is known as the due north line, and having no doubt whatever that the Mississippi River was the western boundary of the old Province of Quebec by the Act of 1774, and that by the Treaty of 1783 the south-western boundary must be either at the international boundary at the north-western angle of the Lake of the Woods, or still further west, they decided in favour of that boundary which they were clearly of opinion Ontario was entitled to. On the north-east they were clearly of opinion that the height of land boundary could not be sustained, and that the true point of departure was the point on James's Bay due north from the head of Lake Temiscamingue.

#### CHARGE OF ADOPTING A CONVENIENT LINE REFUTED.

The sole ground for the charge that they adopted a conventional or convenient boundary, is that the line connecting the north-eastern and south-western boundaries was adopted for the sake of convenience. The Arbitrators were guided in their decisions solely by Acts of Parliament, Proclamations authorized by Orders in Council on the authority of Acts of Parliament, and international treaties. They found in the Proclamation of 1791, that after reaching James's Bay, the description proceeded thus : "including all the territory westward and southward of the said line to the utmost extent of the country commonly called or known by the the name of Canada." If the critics of the award believe such language susceptible of the construction that it lays down a precise spot on the

north-west as a boundary, then their charge might have some foundation, but the fact is that the language would have justified the Arbitrators in extending the boundaries of Ontario very considerably. They were strongly urged by Col. Dennis, one of the permanent staff of the Department of the Interior, after their decision as to the south-westerly and north-easterly boundaries became known, to connect the two points by a natural boundary, and being aware of the fact that the Albany River had been formerly suggested by the Hudson's Bay Company as a satisfactory southern boundary, they adopted it. It is not a little singular that the award was promptly accepted by Ontario, although the only questions of doubt were decided in favour of the Dominion. Both on the west and north the doubts were whether Ontario should not have had more territory.

#### THE MANITOBA BOUNDARY ACT.

I must say a few words on the Boundary Act of last session, which appears to me to be a most extraordinary attempt to solve the question in controversy. The objection made to the award of the Arbitrators is that they did not find the true boundaries, but adopted a convenient boundary. I need not repeat my refutation of this allegation, but even on the assumption that it had any force, it would not apply to the western boundary, regarding which the Arbitrators were clearly of opinion that the international boundary at the north-western angle of the Lake of the Woods, was the true point of departure. The northern boundary which, owing to the vagueness of the language employed in the Proclamation issued under the Act of 1791, is more open to doubt, remains still in dispute between the Dominion and Ontario, so that the Act has simply engaged the Province of Manitoba in the controversy as to one branch of the award, and has thus made confusion worse confounded. Moreover, the Dominion is now contending for a territory on the north of Ontario and eastward of Manitoba's new boundary, which could scarcely be erected into a Province. I do not think, however, that the Act of last session will prove disadvantageous to Ontario. It has put an end to the Dawson scheme of a new Province of Algoma, and it has rendered it almost necessary to settle the western boundary, in which Manitoba is interested, without reference to the northern boundary, with which that Province has no special concern. The western boundary is not only the most important, but the least open to doubt, as I think I have already clearly demonstrated. I will only add in conclusion that the Arbitrators were of opinion that having reference to all

the facts of the case, the boundaries set forth in the award were supported to a larger extent than any other line by these facts, and by the considerations and reasons which should and would guide and govern the determination of the questions by any competent legal or other tribunal.

---













